



Signed and Filed: May 26, 2020

Lewis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case
PG&E CORPORATION,)) No. 19-30088-DM
)) Chapter 11
- and -)) Jointly Administered
PACIFIC GAS AND ELECTRIC COMPANY,))
))
Debtors.))
))
 Affects PG&E Corporation)
 Affects Pacific Gas and)
 Electric Company)
 Affects both Debtors)
))
* All papers shall be filed in)
the Lead Case, No. 19-30088 (DM).)
))

**MEMORANDUM ON OBJECTION OF ADVENTIST HEALTH, AT&T, PARADISE
ENTITIES AND COMCAST TO TRUST DOCUMENTS**

T. INTRODUCTION

On May 15, 2020, the court held a hearing on the objection of Adventist Health, AT&T, Paradise Entities (as defined in the objection) and Comcast (collectively, "Objectors"), to various provisions in the Fire Victim Trust Agreement ("Trust

1 Agreement") and the proposed Fire Victim Claims Resolution
2 Procedures ("CRP", and collectively, the "Trust Documents").
3 Objectors and the Official Committee of Tort Claimants ("TCC")
4 entered into a briefing stipulation on May 4, 2020 (dkt. no.
5 7060). That stipulation limited the arguments of the parties to
6 the content of the Trust Documents, with all other objections to
7 the Debtors' and Shareholder Proponents' Joint Chapter 11 Plan
8 of Reorganization Dated March 16, 2020 (the "Plan") reserved.

9 Under normal circumstances the court would take the time to
10 explain in detail its reasoning behind the decisions summarized
11 below. The exigencies of the current situation, however, and
12 the press of business to prepare for and conduct the forthcoming
13 confirmation trial, make that nearly impossible. Further, the
14 Debtors, the TCC and the Objectors need to know the court's
15 decisions promptly. Thus, this abbreviated ruling will have to
16 suffice. If time permits, the court may follow up with a
17 reasoned memorandum explaining its determinations in detail.

18 For the reasons summarized below, the court will:

19 1) sustain the objection, in part, based on the lack of the
20 possibility of any judicial review of a final decision of the
21 Trustee regarding any claim of a party that objected to
22 confirmation of the Plan;

23 (2) overrule the objections based upon the treatment under
24 the CRP of amounts that have been or are likely to be recovered
25 from insurers or other subrogation parties;

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1 (3) deny the contention that the Plan and the Trust
2 Documents violate Bankruptcy Code section 1123(a)(4)¹.

3 (4) sustain the objection, in part, based upon the need for
4 court approval of any material change in the Trust Documents;

5 (5) defer ruling on the objection based upon alleged
6 adverse interests that are or may be held by the Trustee or
7 anyone else under his direction;

8 (6) defer ruling on the objection based upon the
9 application of setoff or recoupment under the Trust Documents;

10 (7) sustain the objection based on the right of certain
11 parties, including Objectors, to recover attorneys fees under
12 the principle of inverse condemnation;

13 (8) sustain the objection regarding multiple releases; and

14 (9) overrule the objection that the CRP is lacking
15 standards for adjudication of disputed claims.

16 II. DISCUSSION

17 1. Judicial Review at Some Point in the Claims
18 Determination Process

19 The TCC conflates the *treatment* of claims, or a class of
20 claims, with the *determination* of the amount of any particular
21 claim. Section 1122(a) deals with placement of claims in a
22 particular class that are "substantially similar" to others of
23 the same class. Here the similarity of the wildfire claims is
24 obvious: the fires affected thousands of individuals, countless
25 corporations, partnerships and other entities, large or small,

26 ¹ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-
9037.

1 public or private. These similarities suggest a rational class
2 of wildfire survivors consisting of those claimants regardless
3 of whether their claims are presently liquidated or
4 unliquidated.

5 Section 1124 defines impairment to encompass a "class of
6 claims. Here the wildfire claims are unquestionably impaired.
7 Section 1123(a)(3) specifies the treatment of an impaired class.
8 There is nothing in section 1124 about the determination of any
9 particular claim. The determination of any particular claim is
10 governed by Section 502(b).

11 *Dow Corning*, relied on by the TCC, stands for the
12 proposition that class members are subject to the same process
13 for claim satisfaction. It does not extend to determination of
14 any particular claim.

15 The case most in TCC's favor is *Takata*, where certain
16 claims against the Debtor are to be resolved in a similar multi-
17 tier process as in the present case, and not subject to judicial
18 review, even though the same procedure left open the right of
19 certain claimants to proceed judicially against non-debtors
20 after exhausting the claims review process. In *Takata*, nobody
21 objected to these procedures, and therefore they waived their
22 rights. The difference here is that Objectors have objected
23 prior to confirmation. Moreover, the *Takata* procedures appear
24 to be limited to claims of individuals for personal injury and
25 wrongful death claims. There are many such claims in this case,
26 but none asserted by Objectors. The claims of the Objectors
27 would apparently not be governed by the *Takata* procedures, so
28 that case is hardly precedent to take the leap the TCC urges.

1 The TCC has also cited mass tort cases that used
2 streamlined claims resolution procedures. The court notes that
3 none of the cases submitted appear to include language as strict
4 or binding as the CRP. In addition, most of the cases cited do
5 not restrict claimants' ability to file suit if their claims are
6 rejected. For example, both *In re Plant Insulation Co.* and *In re*
7 *G-I Holdings, Inc.* offer claimants a straightforward method of
8 proceeding to arbitration and then to the tort litigation system
9 if they are dissatisfied with the trust's decision. See *In re*
10 *Plant Insulation Co.*, No. 09-31347 (Bankr. N.D. Cal. 2014); *In*
11 *re G-I Holdings, Inc.*, No. 01-30135 (Bankr. D. N.J.
12 2009). These cases do not provide much support for the TCC's
13 position and actually appear to counter it.

14 The Objectors did not waive their entitlement to a judicial
15 claim determination under Section 502(b), no matter how far or
16 long that might occur after completion of the CRP process. *In*
17 *re Elder* is slightly on point. An out-of-court claims
18 resolution procedure had been established whereby claimants
19 could settle their claims with a plan administrator. If that
20 did not work out, they could come to the court for a section 502
21 determination. 325 B.R. 292, 300 (N.D. Cal. 2005). The court
22 stated:

23 ". . . there is nothing inherently inappropriate about
24 the Plan Administrator being given the ability to
25 compromise and settle claims objections, provided that
26 those who are unhappy with the results are still
27 entitled to a hearing in the bankruptcy court. Adding
28 the procedural step of possible settlement through the
Plan Administrator does not violate an objecting
party's right to a final determination on the correct

1 amount of a claim by the bankruptcy court as provided
2 by section 502(b) of the code."

3 The is nothing inherently inappropriate about the CRP.
4 It simply ends the process without an option for
5 dissatisfied Objectors.

6 Objectors are entitled to their guaranteed right to a
7 judicial determination of their specific claims if they do not
8 agree with the Trustee. Whether that should be the bankruptcy
9 court or another court is for another day.

10 The court rejects the speculation that millions if not
11 billions of dollars of trust assets will be depleted if
12 Objectors are told they may return to court. The highly
13 detailed and sophisticated CRP, coupled with the pressing need
14 and desire for thousands upon thousands of wildfire survivors to
15 be compensated at last, suggest that the recourse to judicial
16 review will likely be the exception rather than the rule. It is
17 easy to imagine the vigorous analysis any disputed claim will be
18 given by the Claims Administrator, the Trustee, the Neutrals,
19 and the multi-tiered process, would discourage all but the most
20 determined and aggressive litigant who, years later, might
21 resort to the judicial process.² And even after that, when and
22 if the successful litigant's claim has been *determined*, the
23 *treatment* would still be within capped trust administered by the
24 Trustee and subject to all of the Trust Documents.

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² While the dollar amounts sought by Objectors is large, the
number of those Objectors is quite small.

1 Even if that were the case, that does not justify closing
2 the doors to the court to parties who timely objected to
3 confirmation of the Plan.

4 The order confirming the Plan should include specific
5 language assuring this preserved right of Objectors to seek
6 judicial de novo review after they have exhausted their remedies
7 under the CRP. The court expects counsel for the Debtors, the
8 TCC, the Trustee and the Objectors to make an effort to agree on
9 appropriate language.

10 2. Principles of Subrogation vs. the Collateral Source Rule
11 *Ivanhoe Bldg. & Loan Assn. of Newark, N.J., v. Orr*, 295 US
12 243 (1935) and *In re Del Biaggio*, 496 B.R. 600 (Bankr. N.D. Cal
13 2012) both involved multiple parties who were liable to a common
14 claimant. Both conclude that payment by one liable party (e.g.,
15 wrongdoer, guarantor) does not reduce the full liability of the
16 other, at least until the claimant has been paid in full. In
17 contrast, *Garbell* and other cases relied on by Objectors involve
18 one wrongdoer and another party in contract with the claimant.
19 The insurer or other party invoking a subrogation claim after
20 paying is neither a wrongdoer nor a party liable for the conduct
21 of the wrongdoer under any theory. Thus, the principle of
22 subrogation is distinguishable, and controls the outcome here.

23 The collateral source rule does not address an insurer's
24 right to recover from a tortfeasor in a subrogation action. It
25 merely addresses the insured's rights to recover from the
26 tortfeasor even though the insured has been paid in part by the
27 insurer. See the quote from *Ferraro*: "When the "insurance
28 carrier becomes subrogated to the claim of an insured against a

1 third party tortfeasor, the payment of insurance proceeds is no
2 longer a 'collateral source.' -- because the insurer is
3 independent of the tortfeasor, it is not a 'collateral source.'" The collateral source rule does not apply here. The Trustee can
4 insist upon credits based upon recoveries by the wildfire
5 survivors from their insurers.

6 Objectors complain about how the Trustee will insist on
7 offsets to their claims based on subrogation entitlements not
8 yet paid or realized. The court is satisfied that the process
9 for assessing such future offsets is reasonable, proper and
10 necessarily part of the role and responsibility of the Trustee
11 under the Trust Documents. The application of setoff principles
12 easily comes within the broad array of considerations that
13 encompass *treatment* of the class, far more than would be
14 included in the *determination* of a particular claim.

15 The Objectors are bound by the vote of the class that
16 approves that treatment. This objection is overruled.

17 3. Section 1123(a)(4) Does Not Permit Disparate Treatment

18 The Objectors frame the issue discussed in section 2
19 (subrogation and collateral source) in bankruptcy terms,
20 suggesting that the Plan and Trust Documents do not treat them
21 the same as others in the class. The short answer here is
22 exactly as the TCC argues: equality of treatment is not the
23 same as equality of outcome. Their argument is rejected for
24 that simple reason, as is their complaint that somehow parties
25 with insurance do not do as well as those without insurance.
26 The short answer, once again, is ask someone who lost a home but
27 did not have an insurance!

1 As stated in section 1, all wildfire survivors must be
2 treated alike. The bankruptcy code does not prohibit placing
3 liquidated and unliquidated claims in the same class. Here the
4 fire victims are in a class whether their claims were liquidated
5 by prepetition judgements, presently calculated to the penny,
6 completely unliquidated at present, or any other combination of
7 these alternatives. The classification is rational and for the
8 reasons stated above, Objectors will have an opportunity to have
9 their claims *determined* either through the CRP or the judicial
10 process. Part of the class treatment, however, comes from the
11 estimation process that has or will conclude and the
12 determination that \$13.5 billion is the starting point for
13 channeling the Trust that treats with all of the claimants as
14 its beneficiaries. That analysis does not turn on whether a
15 member of the class had insurance.

16 This objection is overruled.

17 4. Amendments to the Trust Documents

18 The Trust Agreement provides in paragraph 8.3 that it, the
19 CRP, or any other annexed document shall not be modified or
20 amended in any way that could jeopardize, impair, or modify "the
21 applicability of section 105 of the bankruptcy code to the plan
22 and the Confirmation Order." The court believes it is
23 appropriate to include, specifically in the confirmation order,
24 language to the effect that none of those documents may be
25 modified in any material way that is inconsistent with the Plan
26 or the bankruptcy code without approval of the bankruptcy court.
27 The court will leave to counsel for the TCC, the Trustee, and
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1 the Objectors to meet and confer to agree upon appropriate
2 language.

3 5. The Trustee May Not Hold Any Adverse Interest

4 It should be obvious that the Trustee and all others
5 working with him to implement the Trust Agreement, the CRP and
6 all related documents, may not hold any financial interest or
7 act as attorney, agent or professional for the fire victim
8 claimants. The court does not believe that the TCC or the
9 Trustee seriously contend to the contrary. This appears to be
10 nothing more than a drafting anomaly. The court defers any
11 discussion at this point until counsel for the TCC, the Trustee
12 and the Objectors can meet and confer to arrive at mutually
13 acceptable language to implement that notion.

14 6. Clarification re Setoff and Recoupment Rights

15 The Objectors argue that they should not be subject to any
16 ambiguity regarding whether the Debtors or the Trustee may
17 assert setoff and recoupment rights. The TCC responds by
18 pointing out that the Trust Agreement is clear. See dkt. no.
19 7159 at 27:18-27.

20 After careful reading, the court agrees with the TCC. That
21 said, this complex reorganization needs as little confusion as
22 possible. Maybe this is just another drafting anomaly, but the
23 court expects counsel for the TCC, the Trustee and the Objectors
24 to meet and confer and attempt to agree upon appropriate
25 clarifying language.

26 7. Reimbursement of Attorney's Fees

27 For reasons unknown, the TCC has mixed the question of
28 attorneys' liens (not challenged by Objectors) with their

1 entitlement to recover attorney's fees as a matter of law under
2 the California inverse condemnation doctrine. See dkt. no. 7169
3 at 28:19 – 29:4. The TCC's dismissal of this concern by pointing
4 out that there has not been a final determination, while perhaps
5 literally true, is not dispositive. This court has ruled on the
6 question and the Plan and Trust Documents must be consistent
7 with that result, not some wishful thinking that the law will be
8 changed.

9 This objection is sustained. The order confirming the Plan
10 should reflect that determination.

11 8. Multiple Releases

12 The court understands the practical concerns of the TCC and
13 the Trustee about the administrative inconvenience of asking
14 wildfire survivors to sign multiple releases. Still, the notion
15 of a release operating to cover future events flies in the face
16 of careful drafting and invites future confusion. This court,
17 or some other court, does not need to be confronted years from
18 now with a question about what was meant by a release of future
19 conduct. The simple solution is to accept the Objectors'
20 suggestion to add to the Claimant Release "from the beginning of
21 time through the execution date of this release." See dkt. no.
22 7072 at 24:15.

23 This objection is sustained.

24 9. The Trust Documents Establish Adequate Standards for
25 Adjudication of Claims

26 The Court is satisfied that the Trust Documents have been
27 carefully conceived, drafted and prepared for implementation and
28 that, consistent with due process, adequate and appropriate

1 safeguards exist for determination of claims. The TCC's
2 response, and more importantly, the court's review of the CRP,
3 is reassuring that a fair process is in place. There is no
4 concern that the Trustee, the Claims Administrator and the
5 Neutrals will not carry out their assigned roles, proving the
6 confidence the voters who approved this process have in them.
7 In the unlikely event that such confidence ultimately is
8 misplaced, an aggrieved Objector has the remedies the court
9 addressed in Section 1.

10 This objection is overruled.

11 * *END OF MEMORANDUM* *

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